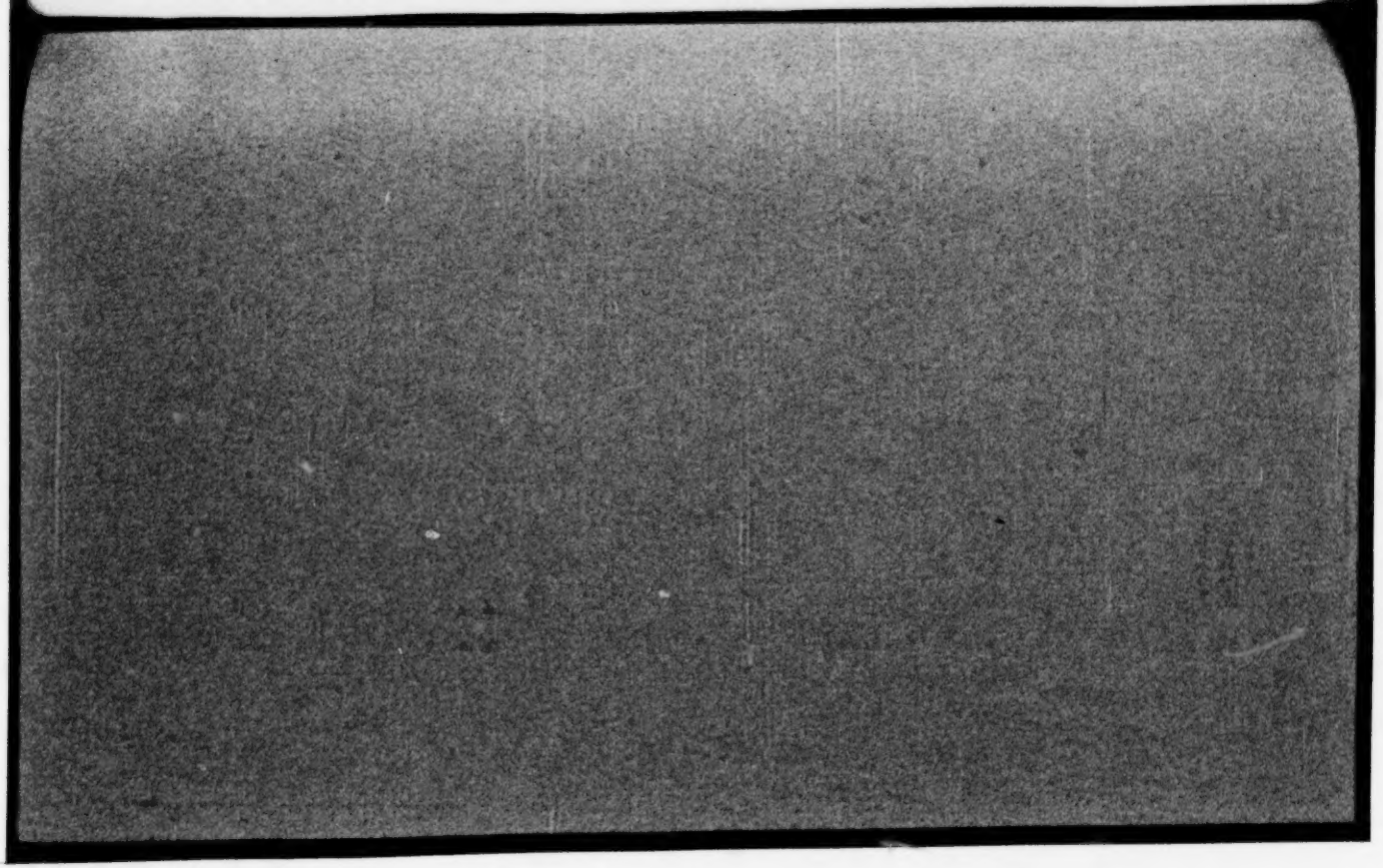

APPENDIX

NOTICE OF HEARING ON ZONING APPEAL

A public hearing will be held before the Richfield Township Board of Zoning Appeals on the 23rd. day of August, 1971 at 7 o'clock P.M. at the Richfield Elementary School, 4315 W. Streetsboro Rd., Richfield, Ohio, for the purpose of hearing the following, relative to the Application of Ohio Sports Center, Inc. to erect a Colosseum on its property, approximately at the northwest corner of the intersection of Ohio Route 303 and Interstate 271, Richfield Township, Summit County, Ohio, Property located in a Commercial Zone:

Request for Variance from Height Limitations

Request for Variance from access limitations

Interpretation regarding side yard usage and variance on same if necessary.

Township Board of Appeals of
Richfield Township
George Cooke, Chairman

OPINION OF TRIAL COURT

Case No. 292110

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, SUMMIT COUNTY, SS:

IN RE: APPEAL OF CITIZENS ORGANIZED FOR THE PRESERVATION OF OUR ENVIRONMENT, a non-profit Ohio Corporation, RICHARD W. WAGNER and PAUL C. DAVIS, from the final order of the Board of Zoning Appeals of Richfield Township, rendered on September 8, 1971,

Appellants,

vs.

RICHFIELD TOWNSHIP BOARD OF ZONING APPEALS,

Appellees.

OPINION

HARVEY, J. (By Assignment)

This is a combined appeal brought by the Ohio Sports Center, Inc. and COPE, et al. There was submitted to the Zoning Inspector of Richfield Township an application for a zoning certificate wherein it was proposed to construct a coliseum on the property in question, which property is located in a C-1 District. The construction of this coliseum would require a variance in the building height provision, to wit: 35′, because the building would be 115′ in height, and the water tower would be 150′ in height, and for these reasons the Zoning Inspector turned down the application for a zoning permit. The appeal was taken to the Board of Zoning Appeals, and from the decision of the Board of Zoning Appeals this matter comes into this Court.

When this matter was appealed to the Board of Zoning Appeals, COPE objected to the hearing before the Board on the ground that the Board did not have jurisdiction. This was based upon the fact that the Board of Zoning Appeals shall publish a notice of the hearing before the Board under the provisions of R.C. Section 519.15, and it is the contention of COPE that at that time there was no notice based upon the ground of use and that the statute provides for the specifying of the grounds.

On the occasion when the hearing was had before the Board of Zoning Appeals a transcript of testimony that is before this Court was made. COPE was present at the hearing and agreed that all questions, and particularly the question of use, would be heard at this particular hearing. Through their counsel they participated in the hearing and raised the question of the Board of Zoning Appeals' authority and power to grant the variance. Sworn testimony is not required in a hearing of this kind, and it is the opinion of this Court that the rights of COPE were fully protected at this hearing, and there is nothing to indicate that any inhabitants were deprived of expressing their opinions.

The other question raised by COPE is whether or not there was evidence before the Board which would legally permit or allow the Board to exercise its discretion to grant a use variance.

The Board of Zoning Appeals finally determined that the Ohio Sports Center, Inc. should be granted a variance under Section 1001-7B for the construction of the coliseum in accordance with the plans submitted. They granted this also under certain conditions: That it was the claim that it would be an unnecessary hardship on the appellant, Ohio Sports Center, Inc., not to be able to use such commercially zoned property for such purpose, and it was the final determination within the meaning and purview of the stat-

ute by the Board of Zoning Appeals that if this property were strictly limited to local retail use, such land could not be economically or feasibly used for such purpose; and that the proposed use of this site would be within the spirit of the Zoning Resolution since it is located at an interstate interchange in an undeveloped area; and that the Zoning Resolutions are intended to provide for recreational uses; that while the proposed coliseum would add to the traffic, the inconvenience to the Township residents would be minimum, and the coliseum would benefit the community as a recreational sports center.

So, the Board of Zoning Appeals granted a variance to construct the building to a height of approximately 115′. This building and sports arena will have a capacity of around 17,000 people, and this height is required to give spectators within the building an unobstructed view of the playing surface. A variance is granted to permit the construction of a water tower to a height of approximately 150′ at the rear portion of this property to provide water pressure for fire protection and water pressure for other purposes, and the water tower would be located 1,800′ from the centerline of State Route 303.

A variance is granted to the Ohio Sports Center to permit three access roads into the site, and it was the finding of the Board that such access entrances are reasonably necessary considering the size of the site with approximately 1,800′ frontage and the number of parking spaces which must be served from the access driveways. The Board granted a variance to the Sports Center to have a driveway and parking within a 50′ area measured from the westerly property line.

There were numerous other conditions placed upon the Ohio Sports Center, all giving consideration to the general welfare of the Township. It was the reasoning of the

Board of Zoning Appeals that the coliseum site consists of 100 acres of land located in a C-1 local commercial zone near the easterly boundary of the Township, and immediately opposite the southbound exit of Interstate 271, fronting on State Route 303, with approximately 1,800′ frontage. The proposed coliseum and parking area would include the front 80 acres of the 100 acre site.

It was further the opinion of the Board of Zoning Appeals that this being an undeveloped portion of the Township and within the area encompassed by Black Road on the west and the Ohio Turnpike on the north, and the fact that there are less than 20 residents located in the immediate area, therefore, the coliseum would not affect any highly developed residential area. This was the opinion of the Board. Although the area around this 100 acres was zoned residential, under the C-1 zoning classification in which this property is located the site cannot be used for residential purposes, and because of the lack of residential development within the vicinity of the site, the site could not feasibly or economically be used for local retail uses, and the size of the site of 100 acres far exceeds any probable need for local retail uses in the area within the foreseeable future.

From the traffic standpoint the Board of Zoning Appeals pointed out, and we believe fairly, that this site is uniquely situated since it is directly opposite the southbound exit of I-271 at its point of intersection with SR-303 and, in addition, is located between the two large metropolitan areas of Cleveland and Akron and is readily accessible by major thorofares from all directions, including the Ohio Turnpike, I-77 and I-271. Moreover, the level terrain of this 100 acres makes it particularly suitable for the proposed use as a coliseum. The Board points out that I-271, immediately to the east, and the Ohio Turnpike, im-

mediately to the north of the site, effectively insulate and isolate the site to the north and east. A workable traffic plan has been provided which will facilitate the flow of traffic directly to and from I-271 and which will minimize any additional traffic burden on SR-303. It is proposed to widen SR-303 for at least the 1,800′ frontage, and the State of Ohio has recommended a plan providing for additional exit lanes from I-271 for incoming traffic to the coliseum site.

In the plans sanitary sewage facilities are being provided and the Court points out that such sanitary facilities will be necessary, and it is presumed that the Board is satisfied with what is planned. Public water supply will be available from the City of Akron, and it is also represented that the coliseum will make available to the Township, as well as the nearby metropolitan areas, entertainment and sports events with particular benefit to youth in the community.

The Board also determined that the coliseum will not result in any disadvantages to the community other than increased traffic, for which a workable solution has been provided; that all the property surrounding the coliseum site is zoned residential R-1, and no further commercial development on those properties could be made without the specific approval of the Township. It is also pointed out that the use of the site as a coliseum fits into the zoning plan for the Township since the site is already zoned for commercial purposes and has ready access to the interstate highway system, and furthermore, it is the policy of the Township to encourage recreational uses.

For these salient reasons the Board of Zoning Appeals concluded by unanimous vote that the proper variances should be made in order that this building be constructed.

A township Board of Zoning Appeals, in granting a variance from a zoning resolution, merely varies the use to which a particular piece of property may be put and does not rezone the land covered by variance, the power to rezone being vested in the Board of Trustees. In applying the doctrine that the Board of Zoning Appeals may authorize a variance from the zoning resolution to avoid unnecessary hardship, it is not governed solely by any one particular reason. No single factor determines what constitutes unnecessary hardship, but all relevant factors taken together must indicate such special conditions that the property cannot reasonably be put to a conforming use because of limitations imposed by its classification under the resolution to warrant a variance on such ground.

Doubtless it is difficult, perhaps impossible, for a Board of Trustees in a township or any legislative body enacting a zoning regulation to envisage the result of its regulation upon each piece of property which may be affected or to weigh and adjust each private and public interest that may be involved. Hence, we have a Board of Zoning Appeals, an administrative agency. The function of such Board of Appeals is to provide a measure of flexibility in the application of a general rule imposed for the general welfare. (*Investment Company v. Cutler,* 125 O.S. 12, p. 21)

It has been held that in order to reverse the decision of a township Board of Zoning Appeals in refusing to authorize a variance from the terms of a zoning resolution, it is not necessary for the Common Pleas Court to find that the Board abused its discretion, but it is sufficient if that Court finds that the decision of the Board, in refusing to authorize the requested variance, represents an unreasonable exercise of that discretion. Conversely, in a review of the decision of the Board of Zoning Appeals in this case wherein they granted a variance, the Court must

look to the record as made before the Board of Zoning Appeals and determine whether or not their action is legal and reasonable and supported by a preponderance of substantial, reliable and probative evidence on the whole record.

This property is zoned for retail use. It is true that it may have been contemplated at the time the resolution was passed that the retail use would consist of small retail establishments. It is probably true that it was never anticipated at that time that a recreational arena, which is retailing recreation in the form of admissions to a sports event, would be considered. Certainly the development of small retail establishments upon this particular piece of property is something that would neither occur nor be feasible in the far, foreseeable future, nor would property values be diminished by reason of the construction of this coliseum, nor would the granting of this variance be contrary to the public interest or the welfare of the community, but on the contrary might be of great benefit.

In the case of *Magloons v. The Board*, 168 O.S. 113, p. 120 Chief Justice Taft used the following language:

> "Certainly if appellant is not permitted to so use its land, that will be a hardship upon appellant. It is difficult for us to see any necessity for the imposition of that hardship with respect to such a large parcel of land as is involved in the instant case."

That language could very well be applied to the facts and circumstances as disclosed in this transcript and the reasoning behind the Board of Zoning Appeals' decision could very well be applied in this situation, the same as in that Supreme Court case.

Appellants COPE take the view that in reality the Board was placing the land in question in a zone different

than that in which it had been placed by the resolution, and, thus, they are claiming that the Board took upon itself legislative power which it did not have. This argument is based on a misconception of the nature of the action taken by the Board. This action does not purport to place the land in a different zone. It did not place the land in a different zone because it was zoned for a commercial use. It was a different commercial use than that set forth in the language of the resolution, but it was not a different zone, and it only purports to relieve the property of some of the restrictions which the resolution imposes on the property within the zone in which it lies. It is a grant of a variance with which we are concerned and not a change of zone. The Board did not act illegally, arbitrarily or abuse its discretion in the exercise of whatever power it had to grant variances vested in it by the Zoning Resolution. The power to grant a variance is very necessary in a situation where the strict letter of any provision of the resolution or where the effect of the application of the resolution is arbitrary, and it would certainly be arbitrary if this land should be confined to small, local retail establishments.

We therefore hold that the Board of Zoning Appeals acted reasonably and that their decision is supported by a preponderance of substantial, reliable and probative evidence on the whole record, and under the particular circumstances it was their duty to grant a variance. Their action is therefore affirmed.

OPINION OF OHIO APPELLATE COURT

(January 5, 1972)

No. 6866.

IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT,

STATE OF OHIO, SUMMIT COUNTY, SS.

In re: Appeal of Citizens Organized for the Preservation of our Environment, a non-profit Ohio corporation, Richard W. Wagner and Paul C. Davis, from the the final order of the Board of Zoning Appeals of Richfield Township, rendered on September 8, 1971.

C.O.P.E., INC., Richard W. Wagner, Paul C. Davis,
Appellants,

vs.

Ohio Sports Center, Inc., Board of Trustees of Richfield Township, Summit County, Ohio; John F. Stewart, as Zoning Inspector for Richfield Township, Summit County, Ohio,
Appellees.

APPEAL ON QUESTIONS OF LAW

OPINION

BRENNEMAN, *J.*

Ohio Sports Center, Inc., (Ohio) appealed to the Richfield Township Board of Zoning Appeals (Board) from a refusal by the Zoning Inspector to grant a permit to Ohio for the construction of a proposed coliseum and sports arena in Richfield Township, Summit County, Ohio. The purpose of the appeal by Ohio was to seek a variance as

to height, side yard and access limitations incident to the proposed construction. The appeal of Ohio was numbered 179.

Citizens Organized for the Preservation of our Environment, C.O.P.E., Inc., (COPE) filed a counter-appeal with the Board, being separately numbered 180. The counter-appeal was based upon the claim that the Zoning Inspector erred in refusing the construction permit, in that his refusal was predicated upon building height, side yard and access limitations, whereas in fact, his refusal should have been based upon a use variance of the C-1 zoning classification of the subject property.

Both appeals were heard simultaneously by the Board, after a request by COPE, and the consent of Ohio to so proceed.

The Board determined, in substance:

1. Ohio is granted a variance under Section 1001-7B of the Richfield Township Zoning Regualtions to construct the proposed coliseum.

2. Ohio is granted a variance to construct the coliseum to a height of 115 feet above a specified grade.

3. Ohio is granted a variance to construct a water tower to a height of 150 feet.

4. Ohio is granted a variance to permit three access roads into the site.

5. Ohio is granted a variance to have a driveway and parking within the 50-foot area measured from the westerly property line.

6. All subject to enumerated conditions.

From the order of the Board, an appeal was taken to the Court of Common Pleas by COPE. By agreement of

the parties, no additional evidence was submitted; consideration by that court was confined solely to the record before the Board. The Common Pleas Court affirmed the Board on all issues, and ordered the Zoning Inspector to issue a building certificate.

From that judgment, C.O.P.E., Inc., Richard W. Wagner and Paul C. Davis, have lodged an appeal in this court, declaring as error:

> "1. The decision of the Board of Zoning Appeals to grant a use variance is unsupported by the hearing record.
>
> "2. The Richfield Township Board of Zoning Appeals lacked jurisdiction to issue a use variance to Ohio Sports Center, Inc., and its action in doing so was therefore unconstitutional and void."

The record establishes that Ohio has entered into a contract to purchase 106 acres of land, located at the northwest corner of the intersection of Interstate I-271 and state route No. 303 in Summit County. The location is readily accessible to the Ohio Turnpike and Interstate I-77, both of which are located a short distance from the situs of the land.

The area surounding the 106 acres is rural in nature, and sparsely settled. There are no structures located on the land; about twenty residences are located within a radius of one mile of the site; the nearest one being 1400 feet away. The population of the entire township is approximately 4900.

The entire 106 acres is classified in the Richfield Township Zoning Resolution as C-1 (Commercial District). Section 410-1 of the Zoning Resolution sets forth the purpose of such district as follows:

"This district is established to provide for uses principally to accommodate the sale of convenience retail goods and personal services purchased frequently for daily or weekly needs. It is intended that the design of this district will encourage groupings of establishments located on a unified site providing adequate off-street parking facilities as well as an efficient and safe method of handling vehicular and pedestrian traffic."

The main thrust of appellant's first assignment of error is directed to the proposition that the Board erred in granting a use variance based upon unnecessary hardship, when, in fact, the record contains no evidence of hardship, and no evidence that the land could not now, or in the foreseeable future, be used for the local retail use assigned to it by the resolution.

Ohio Revised Code Section 519.14 provides, in pertinent part:

"The township board of zoning appeals shall have the following powers:

"* * *

"(B) To authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done.

"* * *."

Our examination of the record discloses no substantial proof that the granting of the *use variance*, so as to permit the construction of the proposed coliseum, is contrary to

public interest. We do find evidence of benefits to the public in the event of its construction. The restriction, as now written in consideration of all the circumstances, has no concomitant benefit to the community. See: In re McDonald, 119 Ohio App. 15.

We further find, from the evidence, that the use of the land as prescribed in the C-1 classification, which reads in part: "principally to accommodate the sale of convenience retail goods and personal services purchased frequently for daily or weekly needs," is not economically feasible.

The Board determined from the evidence presented, and so did the Common Pleas Court, that the imposition of the limited use for retail purposes was unnecessary, and that such limited use imposes an unnecessary hardship upon a large parcel of land, beyond the immediate or foreseeable needs of the community here involved. This evidence, in and of itself, compels us to conclude that it was not error to issue a variance, and that this is so irrespective of whether it is economically feasible to use the land for the purposes for which it was zoned.

For comparison with similar situations, as well as authority for the order granting a use variance under conditions here present, see: Mentor Lagoons, Inc. v. Zoning Board of Appeals, 168 Ohio St. 113; and State of Ohio, ex rel. Killeen Realty Company v. City of East Cleveland, 169 Ohio St. 375.

The transcript of the proceedings in this case convinces this court that there is credible evidence of sufficient strength for the conclusion of the Board of Zoning Appeals, and the Court of Common Pleas, that a use variance should be granted from the limitations of the commercial purpose C-1 classification. We approve of the action taken

by the Court of Common Pleas in this respect. We find nothing in the evidence to indicate that either the Board, or the Court of Common Pleas, acted arbitrarily, capriciously, or unreasonably in arriving at their respective decisions.

We find the first assignment of error to be not well taken.

Appellant's second assigned error is directed to the claim that the notice required by Ohio Revised Code Section 519.15 was insufficient in that it failed to give notice that *"use variance"* would be considered at the hearing on the application of Ohio for height, side yard, and access variances.

Section 519.15, Revised Code, reads:

"The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board of zoning appeals shall be held at the call of the chairman, and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths, and the board of zoning appeals may compel the attendance of witnesses. All meetings of the board of zoning appeals shall be open to the public. The board of zoning appeals shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of township trustees and be a public record.

"Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administra-

tive officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.

"The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days' notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more newspapers of general circulation in the county at least ten days before the date of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney."

The notice given by the Board, and published and distributed pursuant to the provisions of Section 519.15, Revised Code, reads as follows:

"A public hearing will be held before the Richfield Township Board of Zoning Appeals on the 23rd day of August, 1971, at 7 o'clock P.M. at the Richfield Elementary School, 4315 W. Streetsboro Rd., Richfield, Ohio, *for the purpose of hearing the following, relative to the Application of Ohio Sports Center, Inc., to erect a colosseum* [*sic*] *on its property,* approximately at the northwest corner of the intersection of Ohio Route 303 and Interstate 271, Richfield Township, Summit County, Ohio, Property located in a commercial zone:

"Request for variance from height limitations;

"Request for variance from access limitations;

"Interpretation regarding side yard usage and variance on same if necessary." (Emphasis supplied).

It is the claim of appellant that this notice fails to raise the issue of a use variance (construction of a sports coliseum), and is confined to height, access, and side yard variances, as requested by Ohio. Further, that such deficiency fails to vest jurisdiction in the Board to consider a use variance.

The record (exhibits) establishes that on the 19th day of July, 1971, appellant, COPE, by letter, informed the Board that it intended to participate in the forthcoming hearing to determine whether a use variance should be granted.

By a further letter, dated August 17, 1971, COPE requested that its own appeal, number 180, be consolidated with appeal number 179, and that both appeals be heard simultaneously (use variance, as well as construction variances). Both issues were presented at the hearing on August 23, 1971.

It is difficult for this court to accept the argument of COPE that it was denied the opportunity to present its case, when, in fact, the record shows that COPE did participate; that it was granted the consolidation it requested; that it did cross-examine the witnesses, and was offered a continuance of the hearing to present additional evidence.

We are of the opinion that the Court of Common Pleas properly affirmed the decision of the Board on this issue; we reject the appellant's claim of error in this regard as untenable, in our consideration of the record.

We find that the notice as given was adequate and comprehensive, and not deceptive, misleading, or concealing in any material aspect of the issues.

In summary, this court is of the opinion that the Board was well informed by all the evidence, and that its decision was well founded upon competent and credible evidence. We also find the decision of the Board to be valid and reasonable, and free from any prejudicial error, and that the Court of Common Pleas did not err in affirming the Board's decision. See: 58 Ohio Jur. 2d 613, Sec. 158.

The judgment of the Court of Common Pleas is affirmed.

Judgment affirmed.

DOYLE, *P. J.*, and VICTOR, *J.*, concur.

ORDER OF OHIO SUPREME COURT

No. 72-107

THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

COPE *et al.*,
Appellants,

vs.

RICHFIELD TOWNSHIP BOARD OF ZONING APPEALS *et al.*,
Appellees.

Appeal from the Court of Appeals for Summit County.

This cause, here on appeal as of right from the Court of Appeals for SUMMIT County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for SUMMIT County for entry.